5. MALICIOUS PROSECUTION—*Advice of counsel as defence.* In an action for malicious prosecution, if the defendant relies upon the defence that he acted under the advice of counsel and not upon a fixed determination of his own, the burden is on him to prove that he sought counsel with an honest purpose of being informed as to the law, that he made a full, correct, and honest disclosure to his counsel of all the material facts within his knowledge bearing on the guilt of the plaintiff, and that he was in good faith guided by the advice of such counsel in causing the arrest of the plaintiff. Whether such disclosures were made, or the defendant in good faith acted on such advice, are questions for the jury, under the evidence in the particular case.

SOUTHERN RAILWAY CO. v. BRUCE'S ADM'R.—Decided at Richmond, April 6, 1899.—*Cardwell*, J:

1. INSTRUCTIONS—*Inapplicable—Misleading.* Although an instruction correctly states the law, yet if not applicable to the facts and circumstances of the case it tends to mislead the jury and should not be given.

2. RAILROADS—*Crossing—Traveller—Licensee.* A traveller injured by a railroad train at a public crossing stands on a higher footing than a licensee walking on the track, and even among licensees a higher degree of care is required of a person of mature years and in the possession of all his faculties than of an infant of tender years.

3. CONTRIBUTORY NEGLIGENCE—*How shown—Burden of proof.* Although, as a general rule, the burden is upon the defendant to show the contributory negligence of the plaintiff, if it be relied on as a ground of defence, yet if the contributory negligence of the plaintiff is disclosed by his own evidence, or may be fairly inferred from all the facts and circumstances of the case, the burden still rests on him to relieve himself of the suspicion of his own negligence, and it is error to instruct the jury, without qualification, that the burden is on the defendant to prove the contributory negligence of the plaintiff.

4. RAILROADS—*Licensee—Care required—Contributory negligence—Case at bar.* It is the duty of a railroad company to use reasonable care to avoid injury to a licensee on its track, but it is equally the duty of the licensee to take ordinary precautions for his own safety, even if there be negligence on the part of the company, and if through his failure to do so he is injured he cannot recover. The question is not whether the plaintiff's negligence *caused*, but whether it *contributed* to his injury, and if it did there can be no recovery therefor. In the case at bar the plaintiff's intestate walked on the track when there was another safe, suitable, and convenient walkway. He apparently neither looked nor listened for approaching trains, and failed to get off the track though others near him did so.

NORFOLK & WESTERN RAILWAY CO. AND OTHERS v. OLD DOMINION BAGGAGE CO.—Decided at Richmond, April 6, 1899.—*Buchanan*, J:

1. INJUNCTIONS—*Dissolution—Answers.* As a general rule, subject to some exceptions, an injunction properly granted will not be dissolved until the defendant has answered.

2. APPEAL AND ERROR—*Decree overruling demurrer and giving leave to answer.* No appeal lies from a decree overruling a demurrer, giving the defendant leave to

answer and continuing an injunction in force until the further order of the court, where there was no motion to dissolve, and the cause was heard solely upon the demurrer to the bill.

WINFREE v. FIRST NATIONAL BANK OF LEXINGTON.—Decided at Richmond, April 6, 1899.—*Harrison*, J:

1. PRINCIPAL AND AGENT—*Special agent—Transgressing authority.* A special agent who is authorized to dismiss the suit of his principal only on special terms designated in writing transgresses his authority in dismissing the suit on any other terms, without the knowledge of his principal, and the right of the principal to prosecute a new suit for the same debt and to recover judgment therefor against principal and surety is unaffected by such dismissal.

2. APPEAL AND ERROR—*Erroneous instructions—Correct verdict—Harmless error.* This court will not reverse the action of the trial court on account of erroneous instructions given, where it can be seen from the whole record that, even under correct instructions, a different verdict could not have been found by the jury.

TATE v. COMMERCIAL BUILDING ASSOCIATION AND OTHERS.—Decided at Richmond, April 6, 1899.—*Riely*, J:

1. INSURANCE—*Insurable interest—Building association.* A building association has no insurable interest in the life of a member who is in no wise indebted to it. And the fact that the member becomes surety for the association does not create an insurable interest.

2. INSURANCE—*Insurable interest—Advancing premiums.* If a life policy, lawfully effected, be assigned to one whose only interest is the amount of premiums advanced, the assignee can only retain so much of the insurance money collected as will be necessary to reimburse him for the premiums paid, expenses incurred, and interest thereon.

3. INSURANCE—*Receipt of proceeds of policy—Lack of insurable interest—Liability to representative or assignee of assured—Estoppel.* One who receives and accepts the benefit of a policy of insurance on the life of a third person in whose life he has no insurable interest is liable to the representative or assignee of the assured for the sum so received less premiums and expenses paid, if any, and such liability is not affected by the fact that there was a prior contract, without consideration, to effect such insurance. The prior contract was void as against public policy, and a void contract cannot defeat a lawful right.

4. CONTRACTS—*Illegality—In pari delicto.* One who has failed to carry out an unlawful contract, and has entered into a different contract which is in all respects legal cannot be said to be *in pari delicto* in enforcing the valid contract.

5. CONTRACTS—*Illegality—Public policy—In pari delicto.* If an agreement is not intrinsically immoral or evil, and involves no fraud or deception upon anyone, but is condemned by the law simply because contrary to public policy, the maxim *in pari delicto* is not inflexibly applied, but the court will consider whether public policy will be promoted and like agreements discouraged by enforcing or avoiding the agreement, and if the policy of the law will be advanced by granting relief, it will be given, otherwise not.